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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

6
7 TOMAHAWK MANUFACTURING, INC.,
et al.,

Case No. 2:23-cv-01007-APG-NJK

8 Plaintiff(s),

Order

9 v.
10 SPHERICAL INDUSTRIES, INC., et al.,
11 Defendant(s).

[Docket No. 265]

12 Pending before the Court is Plaintiffs' motion to compel, to award expenses, and to impose
13 sanctions. Docket No. 265. The motion was filed on April 19, 2024, no response has been filed,
14 and the deadline to respond has expired. *See* Local Rule 7-2(b). The motion is properly resolved
15 without a hearing. *See* Local Rule 78-1. For the reasons discussed below, the motion to compel
16 is **GRANTED**, the motion for an award of expenses is **GRANTED**, and the motion to impose
17 sanctions is **DENIED** without prejudice.

18 **I. BACKGROUND**

19 This is a trade secret misappropriation case in which Plaintiffs allege that their former
20 employees unlawfully funneled trade secret information to Defendants, who then allegedly sought
21 to capitalize on the purloined information. *See, e.g.*, Docket No. 1 at ¶¶ 86-128. The matter is
22 currently before the Court regarding a discovery dispute.

23 **II. MOTION TO COMPEL**

24 Plaintiffs seek to compel the depositions of Will Steven Hardy, Jordan Parish, and David
25 Spencer, to compel responses to the first set of interrogatories (Docket No. 265-9),¹ and to overrule
26 any objection to Plaintiffs sharing sensitive discovery materials with their designated damages

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28 ¹ The interrogatories were served initially in relation to preliminary injunction proceedings,
but were renewed thereafter during general discovery. Docket No. 265-1 at ¶¶ 16-19.

1 expert (Richard Bero, Joseph Laur, and the directors and analysts at Bero Group). *See* Docket No.
 2 265 at 4-10. The party resisting discovery bears the burden of persuasion, *e.g.*, *V5 Techs. v. Switch,*
 3 *Ltd.*, 334 F.R.D. 306, 309 (D. Nev. 2019), as does the party opposing disclosure to an expert,
 4 Docket No. 105 at 9. In this case, no response was filed to the motion, so it is granted as
 5 unopposed. *See* Local Rule 7-2(d).

6 **III. MOTION FOR AWARD OF EXPENSES UNDER RULE 37(A)(5)(A)**

7 Plaintiffs seek to recover their expenses for filing the above motion to compel. Docket No.
 8 265 at 11-12. Upon granting a motion to compel, there is a presumption that the movant is entitled
 9 to recover its expenses incurred in making that motion. *See* Fed. R. Civ. P. 37(a)(5)(A); *see also*
 10 *Big City Dynasty v. FP Holdings, L.P.*, 336 F.R.D. 507, 513 (D. Nev. 2020). The losing party
 11 bears the burden of establishing an exception to an award of expenses, such as substantial
 12 justification. *Id.* In this case, the Court is granting the motion to compel, *see* Section II, and no
 13 showing has been made by Defendants that an exception exists such that expenses should not be
 14 awarded. Moreover, the record does not appear to support any such exception at any rate. As a
 15 result, the Court will grant the motion for an award of expenses.

16 **IV. MOTION FOR SANCTIONS UNDER RULE 37(D)**

17 Plaintiffs seek the imposition of sanctions pursuant to Rule 37(d) of the Federal Rules of
 18 Civil Procedure. Docket No. 265 at 12-14.

19 Sanctions may be imposed if “a party or a party’s officer, director, or managing agent—or
 20 a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice,
 21 to appear for that person’s deposition.” Fed. R. Civ. P. 37(d)(1)(A)(i). Sanctions may also be
 22 imposed for a failure to respond to interrogatories or requests for production. *See* Fed. R. Civ. P.
 23 37(d)(1)(A)(ii). Potential sanctions include any of those listed in Rule 37(b)(2)(A)(i)-(vi),
 24 including case dispositive sanctions, and an award of reasonable expenses, including attorneys’
 25 fees. Fed. R. Civ. P. 37(d)(3).

26 In this case, it is uncontested that Hardy and Parish failed to appear at their deposition. *See*,
 27 *e.g.*, Docket No. 265-1 at ¶¶ 7, 11. It is also unrebutted that the depositions were properly noticed.
 28 *See* Docket No. 265 at 4-5. From this predicate, the instant motion appears to seek three forms of

1 sanctions: (1) reasonable expenses, including attorneys' fees, (2) striking or denying Defendants' 2 pending motions to dismiss, and (3) case-dispositive sanctions. Docket No. 265 at 13-14.

3 As to reasonable expenses, including attorneys' fees, the Court is already granting an award 4 of expenses above pursuant to Rule 37(a)(5)(A) in relation to the pending motion practice. *See* 5 Section III. While there is some daylight between expenses awarded under Rule 37(a)(5)(A) and 6 Rule 37(d),² Plaintiffs' request for Rule 37(d) expenses is at least somewhat duplicative of the 7 earlier request. Moreover and significantly, the Court has not been provided parameters or 8 delineation as to what expenses it is that Plaintiffs seek to recover under Rule 37(d). *See, e.g.*, 9 Docket No. 265 at 12 (seeking sanctions "arising from, but not limited to," the deposition 10 nonappearances (emphasis added)); *id.* at 13 (seeking "reasonable expenses and attorneys' fees" 11 without specification). The Court declines to award expenses under Rule 37(d) without more 12 specification as to how that relief differs from the other expenses already awarded and without 13 some specification of the universe of expenses being sought.

14 As to striking or denying the motions to dismiss, the motion provides no legal authority of 15 any sort that this is a remedy contemplated by Rule 37(d). Nor does such a sanction make sense. 16 At the most basic level, a motion to dismiss is not the only means to challenge the legal sufficiency 17 of a case, *see also* Fed. R. Civ. P. 12(c) (motion for judgment on the pleadings); Fed. R. Civ. P. 18 56(a) (motion for summary judgment), so the relief sought appears to have little practical effect.³ 19 Moreover, it would be a waste of judicial and party resources to impose this sanction to allow the 20 case to summary judgment or trial if, in fact, the case is subject to dismissal. *Cf. ProDox, LLC v.* 21 *Prof. Doc. Servs., Inc.*, 341 F.R.D. 679, 688 (D. Nev. 2022) (rejecting as a Rule 37(d) sanction 22

23 ² Pursuant to Rule 37(a)(5)(A), a party prevailing on its motion to compel may recover the 24 fees "incurred in making the motion." Fed. R. Civ. P. 37(a)(5)(A). Pursuant to Rule 37(d), a party 25 may recover the expenses "caused by the failure" to appear for deposition or respond to written 26 discovery. Fed. R. Civ. P. 37(d)(3).

27 ³ The papers seem to insinuate that the motions to dismiss were filed as a means to avoid 28 discovery. *See* Docket No. 265 at 13 (indicating that the motions to dismiss were filed "instead of 29 complying with long-requested discovery"). It is black letter law that the filing of a motion to 30 dismiss does not somehow act to automatically stay discovery. *Tradabay, LLC v. eBay, Inc.*, 278 31 F.R.D. 597, 600 (D. Nev. 2011) ("The Federal Rules of Civil Procedure do not provide for 32 automatic or blanket stays of discovery when a potentially dispositive motion is pending").

1 request to “dismiss” pending motion for summary judgment).⁴ As such, the Court declines to
 2 award as a Rule 37(d) sanction the striking or denial of the pending motions to dismiss.

3 As to case-dispositive sanctions, the motion simply invites the Court to impose such a
 4 sanction, but it does not provide the meaningfully developed argument necessary to do so. *See*
 5 Docket No. 265 at 13; *but see Kor Media Grp., LLC v. Green*, 294 F.R.D. 579, 582 n.3 (D. Nev.
 6 2013).⁵ The more significant the relief sought by a movant, the more developed their briefing
 7 should be in support of that relief. *Cobb v. United States*, 2022 WL 1308114, at *1 n.1 (D. Nev.
 8 May 2, 2022). Case-dispositive sanctions are not meant “to be invoked lightly.” *Ballard v.*
 9 *Carlson*, 882 F.2d 93, 95 (4th Cir. 1989). Imposition of case-dispositive discovery sanctions
 10 requires a multi-factor analysis established by governing Ninth Circuit precedent. *Henry v. Gill*
 11 *Indus., Inc.*, 983 F.2d 943, 948 (9th Cir. 1993). While the motion here substantiates unjustified
 12 failures to appear for deposition, it does not provide any analysis as to why that conduct should
 13 translate into case-dispositive sanctions.

14 Accordingly, the Court declines to impose sanctions pursuant to Rule 37(d) based on the
 15 pending motion. While the Court is not imposing Rule 37(d) sanctions herein, the Court is not
 16 condoning the unrebutted discovery abuses identified, but rather has simply not been presented
 17 with briefing showing that the relief sought is warranted. This ruling is without prejudice to
 18 renewing the motion. Any such renewed motion, however, must include robust discussion and
 19 analysis.

20 **V. CONCLUSION**

21 For the reasons discussed above, the motion to compel is **GRANTED** in full. Will Steven
 22 Hardy, Jordan Parish, and David Spencer must sit for deposition by July 12, 2024. Counsel must
 23 immediately confer on these deposition dates. Defendants must respond to the identified

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 25 ⁴ The Court expresses no opinion herein as to the merits of the motions to dismiss.

26 ⁵ In some discovery contexts, courts may impose case-dispositive sanctions *sua sponte*.
 27 *See, e.g., Dreith v. Nu Image, Inc.*, 648 F.3d 779, 787 (9th Cir. 2011) (holding that district court
 28 possesses the authority to impose case-dispositive sanctions *sua sponte* for violation of a discovery
 order pursuant to Rule 37(b) of the Federal Rules of Civil Procedure). Although the motion
 essentially invites *sua sponte* action, it does not cite to any legal authority that doing so would be
 appropriate.

1 interrogatories by June 26, 2024. **FAILURE TO COMPLY WITH THIS ORDER MAY**
2 **RESULT IN A CONTEMPT FINDING AND THE IMPOSITION OF SIGNIFICANT**
3 **SANCTIONS, UP TO AND INCLUDING CASE-DISPOSITIVE SANCTIONS.** In addition,
4 Plaintiffs are permitted to share sensitive discovery information with their identified damages
5 expert (Richard Bero, Joseph Laur, and the directors and analysts at Bero Group).

6 The motion for an award of expenses under Rule 37(a)(5)(A) is **GRANTED**. If the parties
7 do not agree on an amount of expenses to be paid to Plaintiffs, then Plaintiffs must file, no later
8 than June 26, 2024, a “Motion to Calculate Expenses” providing all information required to
9 determine the reasonable expenses incurred in making the motion.

10 The motion for sanctions under Rule 37(d) is **DENIED** without prejudice.

11 **IT IS SO ORDERED.**

12 Dated: June 12, 2024

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14 Nancy J. Koppe
United States Magistrate Judge

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